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# BRIEF SURVEY OF THE DEVELOPMENT OF AIR LAW [1]

## (HISTORICAL BACKGROUND, 1899-1949)

*(European, American and Indian)*

By

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Although it is a most significant fact that war has played a major part in and also is the basis for the first international agreements concerning aerial navigation yet so far back as 1899 and 1907 the two respective Hague Peace Conferences dealt with International Navigation but only indirectly from some military standpoint In 1909 the International Juridic Committee on Aviation, with representatives from some of the important European and American countries, such as, Russia, Great Britain, U S A, and South America, met at a conference in Paris and decided upon the outline of a legal code of the air, which has since been in the process of elaboration and progress Several national committees were formed there under a central committee for the examination of the then existing airlaw as prevalent in their respective countries and for suggestions to the Central Committee for its improvement and modification The recommendations that were formulated through the perseverance of that Central Committee were considered and passed by the respective Air Congresses held at Paris in 1911, at Geneva in 1912 and at Frankfurt in 1913 On the other hand in the U S A the local Aero Club affiliated itself with the *Federation Aeronautique Nationale* and began to function locally with the recommendations arrived at by the latter In Europe the Institute of International Law busied itself in researches of the airlaw from 1905 to 1911, particular consideration being given to the regulations of aircraft, licensing of pilots, property rights in air, claims of sovereignty in superjacent airspace for the free circulation of aircraft and like questions Serious efforts were being made to build up a code of airlaw quite in keeping with the progress of aviation The speculations of the Institute took tangible shape when its findings governing aircraft were adopted at the Madrid session of 1911 Next an agreement was entered into between France and Germany on the principles agreed upon at Madrid for admission of aircraft, both military and private, under certain defined and restricted conditions Later on at the Pan-American Aeronautic Federation held at Santiago, Chile, in 1916, some definite principles were adduced as also a few of the eventful declarations of the Hague Peace Conferences of 1899 and 1907 were repudiated by that Conference But it will be worthwhile to recapitulate the important principles that were laid down there for general acceptance They were : (1) that all airspace to be declared State property ,[2] (2) that navigation in the airspace above

1 The excellent treatises on Airlaw by Spaight by Shawcross and Beaumont and by McNair and the American Book on the Law of Air by Rowland W Fixel (Michigan : 1948) were laid under contribution in the preparation of this article —*Writer.*

2 It is interesting to note that so far back as 1869, *Norman, J*, in *Bagram* v *Khettranath Karforma* (3 B L R 14 at p 43) held "No man has any absolute property in the open space above his land. To interfere with the column of air superincumbent over such land is not a trespass,"

the American continent and adjacent seas to be free to all Americans and to aliens domiciled in America, (3) that States to have sovereign rights in the airspace over their respective territories, (4) that all aircraft to have a nationality; (5) that public vessels to have the nationality of the States to which they belonged and private vessels that of their owners, (6) that all aircraft to carry a distinctive national emblem, (7) that States to agree to a code of instructional regulations governing air traffic; (8) that aerial warfare to minimise as far as possible risks to non-combatants and neutrals; (9) that belligerents not to violate neutral commerce and neutral States The Chicago Air Conference which followed it accepted all those principles and went a step further by recognising the right of freedom of passage in airspace of all aircraft and even the right in transit landings

No sooner had the first Great War of 1914-19 terminated than the Big Powers came to realise that a new era was coming when air-craft was sure to play a very prominent part in the existence of man Thus as soon as the hostilities were over and normalcy was resumed, they lost no time in meeting together in a convention at Paris, in October, 1919, for the purpose of formulating broadly some definite rules for the future of aerial navigation 29 States, big and small, of both the hemispheres, solemnly signed the conclusions that were made at that important meeting The most pertinent topics of airlaw on which the discussion mainly centred there were that over the high seas the airspace was free and that over the airspace over land, including internal and territorial waters, the airspace was free, subject only to the rights of States recognised in the interests of their self-preservation The reason employed was that air was physically incapable of appropriation, because it could not be actually and continually occupied on the analogy of the argument employed by the great International Law authority, Grotius, regarding freedom of the seas and that on the analogy of the maritime belt on territorial waters, there are over the land and waters of each State, a lower zone of territorial airspace and a higher and unlimited zone of free airspace Thus the main conclusion arrived at was that a State had complete sovereignty in its superincumbent airspace to an unlimited space subject to the right of innocent passage for foreign non-military aircraft akin to the right of innocent passage of merchant ships through territorial waters of other countries After the deliberations were over, the important points that were settled for future guidance in such matters were (1) that each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States subject to the conditions laid down by them, (2) that each of the such States will be entitled for military reasons, or in the interest of public safety, to prohibit the aircraft of other States from flying over certain areas of its territory, the position and extent of which is to be declared beforehand; (3) that all aircraft will possess the nationality of the State on the register of which they are entered, (4) that each aircraft of a contracting State has a right to pass through the airspace of another, but must follow the route fixed by the State therefor and every such aircraft when passing from one State to another, must, if the regulations will require it, land at one of the aérodromes prescribed by it, (5) that the State flown over has jurisdiction to bring action with regard to any breach of its laws regarding public safety and its military and fiscal laws by breach of any of the regulations concerning air navigation.

The British by reason of their the then far-flung Empire had come to appreciate that they would of all Powers be vitally affected by the advent and development of aircraft and so they had the British Air Navigation Act of 1920 passed for their own guidance moulding it on the lines of the findings of the momentous Paris Convention but going somewhat still further Complete and exclusive sovereignty over the airspace above the territory of a State both in the mother country and the Colonies and the territorial waters adjacent thereto was the main principle endorsed both at the Paris Convention and by the British Navigation Act that followed closely the former, the other rules and regulations being based on the salient points accepted by both.

Closely following upon the heels of the Paris Convention, some of the Southern European States held amongst themselves another like Convention at Madrid in 1926 ratifying the conclusions of the Paris Convention, which formed in fact the first landmark of an aircode for their own guidance And also in the other hemisphere, the Pan-American Convention at Havana, in 1928, which may be termed the second landmark on the subject, brought about by some of the important American States for further ratification of the rules relating to International carriage by air, followed by a similar unratified Convention at Warsaw in 1929, where damages for liability in air-navigation and the period of limitation therefor were provided for The British Air Navigation Act of 1920 in clarifying the British attitude on the subject provided, amongst other things (1) that there was sovereignty of the State (*imperium*) over its airspace, both in the mother country and the Colonies and the territorial waters adjacent thereto , (2) that all aircraft was bound to follow prescribed routes, but by reason of security of the State flown over, if ordered, should land whenever demanded ; (3) that International airways should be subject to the control and guidance of all the signing States , (4) that no action for trespass or nuisance for mere flight at a reasonable height over the property of a private individual should ordinarily lie, but, if any loss or damage would occur therefrom absolute liability would be upon the owner of the offending aircraft to pay compensation, irrespective of the fact, whether the person was really negligent or not, because of his *dominium* , (5) that any offence under the Act, or Order in Council, or regulations made thereunder, on a British aircraft, will, for the purpose of conferring jurisdiction be deemed to have been committed in any place where the offender may, for the time being be found, providing at the same time that His Majesty, by Order in Council, may make provision as to the Courts in which proceedings may be taken for enforcing any claim under the Act, or any other claim in respect of an aircraft, and, in particular, may confer jurisdiction upon any Court exercising Admiralty jurisdiction The British, who held supremacy over the seas over a couple of centuries, were first induced to treat an aircraft more or less like a vessel on the water Thus they likened the aircraft to a floating ship on that seductive analogy Accordingly they ruled that the law of the flag should govern all acts done on board thereof But Dr Spaight, the eminent British Air authority, in controverting that popularly-accepted view, has declared that the aircraft is strictly speaking not a floating ship "It is," as he has so graphically described, "essentially a locomotive vehicle—a mechanical magic carpet—in which one never settles down The journey is a brief passing interlude between ordinary life and business at one place and business at another and the passenger's connection with the flying machine is more casual and transitory than with the ship and to be explicit on the point caravans and motors cannot possess the characteristics of a floating ship " Such logical and authoritative pronouncement tended to bring about a transformation in the hitherto accepted conceptions on some important points in the airlaw.

As civil aviation kept on making rapid strides with the opening of new International routes, England, America, France and Holland were getting themselves busy in investigating the new and newer phases in aviation as would affect them legally through their eminent legal advisers Insurance was one of such phases as also crimes and torts and similar matters on board an aircraft Both continents moved fast and frequent in carrying on investigations in order to grapple with the new and newer problems arising in air-navigation, the more enterprising America ever outstripping Europe Great Britain by her amended Air Act of 1932 accepted the recommendations of the Warsaw Convention regarding insurance of goods carried by air bringing about some unification thereon Similarly at another Air Convention at Paris, in 1936, France undertook important decisions on nine important points affecting aviation generally

Between 1920 and 1930, it appears, both in England and America eminent lawyers and others were making weighty contributions to the legal journals and writing treatises on some phase or other concerning Airlaw The Calcutta University,

through the Onauthnauth Deb Law Research Prize, instituted research on the *Problems of Aerial Law* in 1924, the winner of the prize being my ever-esteemed friend Dr B K Mukherjea (subsequently a Judge of the Calcutta High Court and at present of the Federal Court of India) The Chicago Airlaw Institute in 1930 invited the then distinctly air-developed countries to send representatives to a conference for deliberations on the varied topics connected with the *Law of the Air*. At such a gathering some very valued and momentous observations on the subject were recorded The Calcutta University, although India had not then become in any way air-minded or air-developed, instituted a course of important lectures in 1931 on the *law of the Air* by inviting the British representative at the Chicago Air Conference mentioned above (subsequently Mr Justice McNair of the Calcutta High Court) to deliver a course of 12 lectures as the Tagore Law Professor of the year on that important legal topic. Much of the matter dealt with by that learned lecturer in his lectures were rather scrappy, tentative and recommendatory as there was really no help for it, when sufficient cases and precedents on which he could have discoursed and theorized had not yet come to light But it is a matter of great pity that in no other place in this vast country, any other body or organisation has since made any attempts whatsoever to institute similar enquiry or research on this subject of daily-growing importance in our national life Although India had not then become at all aerially-developed still the British Government in India lost no time in making provision for the proper safeguard of the insurance aspects of their commercial aviation by enacting the Carriage by Aircraft Act (XX) of 1934, by which liability of the carrier by air was fixed for deliberate negligent pilotage, or negligence of the aircraft in course of navigation, and provided for injury or death of the passenger as well as compensation for delay prescribing two years as the period of limitation for suits on that head on the recommendations of the Rome Convention of 1933. Next they also passed the Indian Aircraft Act (XXII) of 1934 for the control of navigation generally and that for the manufacture, possession, use, operation, sale, import and export of aircraft in this country, by section 9 thereof the provisions of Part VII of the Indian Merchant Shipping Act (XXI) of 1923 relating to Wreck and Salvage were made applicable to aircraft on or over the sea of tidal waters as they applied to ships, by section 7 of the Act the Government took powers to make rules touching the investigation of accidents occurring within British India; by section 16 of the Sea Customs Act VIII of 1878 was made applicable with proper modifications and adaptations to the import and export of goods by air and by section 17 exemption was granted to liability for flying over private property at a reasonable height above the ground, allowing in particular instances of hardship a right of compensation.

Next the Universal Postal Union Convention at Paris in 1934 settled some vital matters regarding postal transport of mails and articles by air. On the same lines the International Telecommunication Convention of the same year made provisions for communication by radio calls and signals and for classifying different kinds of such messages The recommendations of both those conventions were duly accepted by the British Government in India for their own internal administrative respective departmental guidance.

It will be worthwhile to mention in this connection the four epoch-making International documents relating to airlaw, *viz*, (1) Interim Agreement on International Civil Aviation, (2) Convention on International Civil Aviation; (3) International Air Service Transport Agreement, and (4) International Air Transport Agreement—all of which were done at Chicago on the 7th day of December, 1944, and to all of which, amongst other signatories, India was one [1]

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1 The four documents are set out in detail in the appendix portion of Rowland Fixel's *Law of Aviation* (Virginia 1948) and the four together constitute a fairly complete aircode.

It is patent that the British Indian Government enacted some legislation in accepting some recommendations of some of the important Air Conventions in a haphazard and irregular way in order just to meet the then prevailing situation of this country. But there was functioning no Standing Committee in the Central Legislature, or any special Air Department in the Central Government at Delhi, where study and research in the important domain of air law was carried on. Whatever of moment happened in the western continent affecting commercial aviation was quickly reflected in some way or other in India if that somehow concerned the British Government's administration. But considering the daily-growing importance of the subject, the remissness hitherto on the part of our National Government of the day is somewhat culpable with the rapid opening of both scheduled and unscheduled airlines and the quick growth of all-round air service, carriage of mails and articles by aircraft. Both domestically and internationally complex legal problems in respect of airlaw are sure to crop up soon or late. Prudence and sagacity would therefore require study and research betimes of the many and varied problems regarding crimes, torts, accidents, breach of contract, liability of the charterer, compensation for loss of trip, liability for wilful delay etc., that will occur in passengers' airships. The institution of a simple course of airlaw as accepted in Europe and America and as adapted to India for the study of the future law graduates in our Universities has therefore become essential. It will be inexpedient to keep off the study of such a subject which has assumed so much importance of late as if it were something that mainly concerned Private International Law despite the obvious boundless possibility of the expanding airways.

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## POWERS OF A COMMITTING MAGISTRATE UNDER SECTION 220, CRIMINAL PROCEDURE CODE

By

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The propriety of the order of a Magistrate cancelling, at the time of committing the accused to Sessions, the bail granted to them by the High Court and taking them into custody came up for consideration before a Full Bench in *Seoti and others* v. *Rex*[1]. Virtually this amounts to an interpretation of the powers of the committing Magistrate under section 220 of the Code of Criminal Procedure. This is a section very poorly discussed. There are no two cases bearing on this section reported. The commentaries in text books make but a passing reference to this. The decision of the Full Bench above referred to is of far reaching consequence. Even in Provinces where this decision may not be binding it will have a very great persuasive influence on the magistracy.

Though the order that was canvassed before the High Court of Allahabad was the action of the committing Magistrate at the time of committing the accused and virtually an action of the Magistrate under section 220, Code of Criminal Procedure, the contention raised by the accused was that "when bail has been granted by the High Court or Court of Session, it is not within the power of a subordinate Court to cancel it at a subsequent stage in the proceedings and that therefore the order of the Magistrate in cancelling the bail granted . . is irregular." It is very unhappy that the contention should have been worded as above. It is submitted that it would have been more appropriate and conducive to a proper understanding if, instead of taking the above contention itself as an issue, the scope of section 220, Criminal Procedure Code, had been discussed and applied to the

1. A I R 1948 All 366 : 49 Cr L.J 521 (F B)

action of the Magistrate Further it would have started without the misleading words "cancelling the bail" appearing in the contention

The whole discussion has centred round these words, whether the Magistrate could "cancel the bail" The final conclusion arrived at by the Full Bench was that the Magistrate "had no power to cancel the bail which had been granted . by the High Court and . . . by the Sessions Court" The fact that section 220, Criminal Procedure Code, has been referred to and that the order of the Magistrate was one passed at the time he committed the case lead us to interpret this decision as holding that a committing Magistrate even under section 220, Criminal Procedure Code, has no power to take to custody an accused if he had been admitted to bail by either the Sessions Court or High Court, except when the order of the Higher Tribunal was *specific in* saying that its interference was temporary

The reasons given for this decision were (1) section 220 is subject to section 497 and consequently a Magistrate cannot cancel a bail not granted by himself; (2) the decision in *Mirza Mohammad Ibrahim* v *Emperor*[1] Of these the second reason may be taken up first. The decision in *Mirza Mohammad Ibrahim* v *Emperor*[1] does not reason out the conclusion In fact the extract in the case under advertence is just what one finds in that case. The statement of Kendall, J, is more like an expression of a person whose prestige is wounded He is upset that the Magistrate consigned the accused to jail in the face of his order How the Magistrate was wrong in what he did he has not pointed out Therefore, it is submitted that the Judges, who constituted the Full Bench, really got no support from this decision Consequently if the conclusion is to be supported at all it should be because of the first reason

The Judges considered that the committing Magistrate's action in remanding the accused to custody was tantamount to cancelling the bail earlier granted They also held that section 220, Criminal Procedure Code, which empowered the Magistrate to remand the accused, was subject to the provisions of bail They said that under section 497 the Magistrate could not have cancelled the bail granted by the Higher Tribunal

Certainly under section 497, which is the only provision enabling the cancellation of a bail granted earlier, a Magistrate cannot cancel a bail which he himself has not granted The question arises as to whether the Magistrate cancels at all any bail at the time he acts under section 220, Criminal Procedure Code The one reason that can be inferred is that section 220 refers to section 497 Section 497 consists of 5 sub-sections, four of them relating to taking of bail and only the 5th to cancelling of bail Section 220, Criminal Procedure Code, states that the provisions contained therein are subject "to the provisions of this Code regarding taking of bail" The section does not say only "subject to the provisions of this Code regarding bail" but says "subject to the provisions of this Code regarding *taking of bail*" (Italics mine) Is it without any purpose that the words "the taking of bail" have been used? Because the Judges considered that the Magistrate's action amounted to cancellation of the bail, they held that the reference to section 497 in section 220 of the Criminal Procedure Code was only to sub-section (5) of section 497 and not to the other sub-sections This is moving in a vicious circle

There is no reason why the restrictive portion of section 220 should be restricted to sub-section (5) of section 497 Section 497 has four-fifths of it relating to taking of the bail and a fifth to the cancellation of bail When the words used in section 220, Criminal Procedure Code, are "subject to the provisions of this Code regarding the *taking of bail*" one ought to refer in section 497 to the portion relating to the 'taking of bail' and not to the portion relating to its cancellation In this view it would appear as if the judgment in the above case started with wrong premises.

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1 A I R 1932 All 534.

Having arrived at the conclusion that the more correct view of interpreting section 220, Criminal Procedure Code, is to subject its provisions to the sub-sections in section 497 relating to taking of bail it may be said that the action of the Magistrate at the time of committal does not amount to a cancellation of any bail at all Under this section the Magistrate is bound to commit the accused, by warrant, to custody He has no option when the enabling provision does not come to his aid But the enabling provision says that the committing of the accused is subject to the provisions of the Code regarding the taking of bail, *i e*, the Magistrate is obliged to commit the accused to custody if acting under the provisions of section 497, Criminal Procedure Code, he does not find the accused deserving of being enlarged on bail

If this is the view that has to be taken, then how is this to be reconciled with the bail granted by the appellate authority ? Dr Faruqui, in the above case, on behalf of the Crown suggested that a bail granted by a Higher Tribunal is good for that stage of the proceedings only Their Lordships of the Full Bench did not agree with this suggestion on the ground that it would lead to confusion and that there is no justification for it in any provisions of the Code But it can be said that the bail granted by the Higher Tribunal would hold good till it is cancelled or exhausted The former need not be considered The other prospect raises the question as to when the bail gets exhausted One instance is when the trial ends. The learned Judges constituting the Full Bench themselves said "it is clear that the bond does not continue till after the end of the trial and any order granting bail to an accused person during an enquiry or trial is obviously effective only up to the termination of the trial and no further " This is so not because the Higher Tribunal used any expression limiting the scope of the bail but because of the statute itself—the other provisions like section 499 and section 426 Thus it may be said that a bail granted by whomsoever it may be exhausts itself on the day the trial ends A committal ends the proceeding as far as that Court is concerned and naturally all bail granted must exhaust on that day If the view that the committal ends the proceedings in a committing Court and consequently the bail granted exhausts itself is not conceded, yet by virtue of the words " the Magistrate shall . . commit the accused by warrant, to custody " the bail exhausts itself on that day This position is strengthened further if we dissect the position granting bail Usually bail should be applied for in the Court of first instance, except when it is too obvious that it cannot give relief On this or later, on the Session Judge's refusal of the bail the High Court acts Thus when a Sessions Judge or High Court acts it is always on the same set of facts as brought forth the refusal in the first instance But the stage at which the Magistrate commits is different from the stage at which bail is granted Bail is granted on the evidence placed then before it Subsequent enquiry may either strengthen it or undermine it A bail once refused may successfully be obtained at a later stage The four sub-sections of section 497, Criminal Procedure Code, admit of such a possibility Thus a bail once granted or refused is not permanently granted or refused during the trial It is good only not during that stage of proceeding as Dr Faruqui contended but during the continuance of the position that permitted the grant or refusal of bail When once it is altered the order of the High Court exhausts But this does not mean that a Magistrate examining a witness, after the grant of bail by a Higher Tribunal, could say that the position is altered and so he can take the accused to custody. Though the situation alters yet, since section 497 (5) does not apply there is no enabling provision , he cannot halt to consider whether the situation has altered at all That stage is reached at the time of committal when the Magistrate makes a survey of the entire evidence. Therefore it is to be said that unless the Higher Tribunal cancels the bail it enures till the Magistrate is enabled to review the situation. When once it exhausts the Magistrate should commit the accused to jail, of course subject to the provisions of the Code regarding the taking of bail. The Higher Tribunal cannot be deemed to have given a bail which would be good under all circumstances and places until interfered with by itself.

It may now be set down that by virtue of principles guiding the grant or refusing of bail, the use of the words "the Magistrate shall commit" the accused to custody a bail granted by a Higher Tribunal exhausts itself on the day the accused are committed and consequently no question of cancelling any bail arises

One more question remains to be answered in this respect It may be asked whether it would not amount to self-deception to say that a bail granted by a Higher Tribunal, after the framing of a charge and prior to committal and when there is no more evidence, would exhaust itself on the day the Magistrate commits It would not be so When the accused prayed after framing of charge for being admitted to bail and the committing Court refused but the Higher Tribunal granted bail, the Higher Tribunal will have exercised its mind on the same set of facts Therefore on the convention that a subordinate Court on the same set of facts should respect the opinion of the Higher Tribunal and feel bound by it, when the Magistrate considers the question of taking bail referred to in section 220, if there is no more evidence affecting the situation, he should respect the view of the Higher Tribunal and grant bail to such of the accused as had been granted bail earlier by the Higher Tribunal. Even then he should admit the accused to bail and not allow them to continue on the bail granted by the Higher Tribunal as it is no longer there having been spent out by virtue of the words "shall commit" in section 220, Criminal Procedure Code.

In conclusion it may be said any bail granted prior to committal stage exhausts on the day the Magistrate commits the accused to custody and there is no question of any cancellation of bail. As called upon by section 220, Criminal Procedure Code, the Magistrate shall commit the accused unless under the provisions of section 497 the accused deserve of being admitted to bail